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Mitchell v. Horn

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PRECEDENTIAL

Filed February 14, 2003

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 98-1932

MARK MITCHELL,

Appellant

v.

MARTIN F. HORN, et al.

Appeal from the United States District Court
for the Eastern District of Pennsylvania
(D.C. Civil Action No. 98-cv-04742)
District Judge: Honorable Edmund V. Ludwig

Argued August 1, 2002

Before: ROTH, RENDELL* and AMBRO, Circuit Judges

(Filed: January 29, 2003)

* The Honorable Marjorie O. Rendell participated in the oral argument and conference and joined in the decision in this case on August 1, 2002, but became recused from this matter prior to filing of the opinion. This opinion and judgment are being entered insofar as the remaining judges are unanimous in this decision.

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ORDER AMENDING SLIP OPINION

AMBRO, Circuit Judge:

It is now ordered that the published Opinion in the above case filed January 29, 2003 be amended as follows:

Please insert an asterisk and accompanying footnote on the cover page caption by Judge Rendell's name. The associated footnote should read: "The Honorable Marjorie O. Rendell participated in the oral argument and conference and joined in the decision in this case on August 1, 2002, but became recused from this matter prior to filing of the opinion. This opinion and judgment are being entered insofar as the remaining judges are unanimous in this decision."

On page 7, please replace the last two sentences of the first full paragraph (beginning with "The Commonwealth concedes . . .") with the following: "See *Miller v. Norris*, 247 F.3d 736, 740 (8th Cir. 2001) ("[A] remedy that prison officials prevent a prisoner from 'utiliz[ing]' is not an 'available' remedy under S 1997e(a) . . .") (alterations in

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original). The Commonwealth acknowledges that the District Court incorrectly dismissed this claim because it did not consider Mitchell's allegations that he was denied grievance forms."

On page 7, please replace the last sentence of the second full paragraph with the following: "Thus, even if Mitchell failed to exhaust his available remedies (excused if there were a failure to provide grievance forms), the District Court was premature in dismissing his complaint."

On page 17, please replace the first sentence of Section IV ("Conclusion") with the following: "If Mitchell were not provided grievance forms (a fact that needs to be determined by the District Court on remand), he has exhausted the available administrative remedies on his conditions-of-confinement claim as required by S 1997e(a). In any event, he has stated a nonfrivolous retaliation claim."

By the Court,

/s/ Thomas L. Ambro
Circuit Judge

Dated: 14 February 2003

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Clerk of the United States Court of Appeals
for the Third Circuit

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